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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

TRI-COUNTY CONCERNED CITIZENS ASSOCIATION, PATTY BRANN, KATHY BRILL, WILLIAM CRANSTON, HOLLY HARTSHORNE, AND BARBARA MESSNER
Petitioners

v.

RAYMOND CARR, MORGANTOWN PROPERTIES, INC., WILLIAM BETZ, JUDITH BETZ, ROBERT G. WILLIAMS, CAROLYN WILLIAMS, CHERYL CONKEL, and NEW MORGAN BOROUGH

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Petition for a Writ of Certiorari

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QUESTIONS PRESENTED

1) Is a local government subdivision exempt from liability for takings without substantive due process because those takings are effectuated against properties in neighboring local government subdivisions?

2) May a plaintiff bring a RICO suit where the plaintiffs' injuries were proximately caused by the defendants' illegal acts if the injuries were not the immediate result of the defendants' act but, rather, a result of the end?

3) Should leave to amend be granted where the proposed Amended Complaint would add necessary, relevant facts at the pretrial stage in a complex case?

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Appendix B - Order and Memorandum of the United States District Court for the Eastern District of Pennsylvania dated September 18, 2001.

Appendix C- Order and Memorandum of the United States District Court for the Eastern District of Pennsylvania dated November 20, 1998.

Appendix D- Opinion of the United States Court of Appeals for the Third Circuit filed December 07, 1999.

Appendix E- Order and Memorandum of the United States District Court for the Eastern District of Pennsylvania dated October 04, 2000.

Appendix F- Order and Memorandum of the United States District Court for the Eastern District of Pennsylvania dated December 12, 2000.

Appendix G- Order and Memorandum of the United States District Court for the Eastern District of Pennsylvania dated January 30, 2001.

Petitioners, Tri-County Concerned Citizens, et al., respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals is reported at Tri-County Concerned Citizens Ass'ns v. Carr, 47 Fed.Appx. 149, 2002 WL 31122810, RICO Bus.Disp.Guide 10,352 (3rd Cir.(Pa.) Sep 26, 2002) (Not selected for publication in the Federal Reporter, NO. 01-3877) (Appendix A).

The opinion of the district court in Tri-County Concerned Citizens Ass'n v. Carr, (E.D.Pa. Sep 18, 2001) (NO. CIV. A. 98-CV-4184) is not published, but can be found at 2001 WL 1132227. (Appendix B).

There are five additional, related Orders. The first opinion of the District Court is reported at Tri-County Concerned Citizens Ass'n v. Carr, 1998 WL 966019, RICO Bus.Disp.Guide 9618 (E.D.Pa. Nov 20, 1998) (NO. CIV.A. 98-4184). (Appendix C). The decision of the Court of Appeals reversing that Order is reported without an opinion at Tri-County Concerned Citizens Ass'n v. Carr, 205 F.3d 1330, RICO Bus.Disp.Guide 9829 (3rd Cir.(Pa.) Dec 07, 1999) (TABLE, NO. 99-1219) . (Appendix D).

On remand, the District Court's decision granting Leave to Amend is not reported but is available at Tri-County Concerned Citizens Ass'n v. Carr, 2000 WL 1521615 (E.D.Pa. Oct 04, 2000) (NO. CIV.A.98-CV-4184). (Appendix E).

The opinion of the District Court denying leave to amend is not reported, but is available at Tri-County Concerned Citizens Ass'n v. Carr, 2000 WL 1824172 (E.D.Pa. Dec 12, 2000) (NO. CIV.A. 98-CV-4184) . (Appendix F). The District Court's decision denying reconsideration is not reported, but is available at Tri-County Concerned Citizens Ass'n v. Carr, 2001 WL 87739 (E.D.Pa. Jan 30, 2001) (NO. CIV. A. 98-4184) . (Appendix G).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on September 26, 2002. (Appendix A).

The Jurisdiction of this Court is invoked under 28 U.S.C.1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1964(a) of the Racketeer Influenced and Corrupt Organizations Act (RICO) provides, in relevant part, as follows:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this

> chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

18 U.S.C. § 1964(a)

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO) provides, in relevant part, as follows:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run

on the date on which the conviction becomes final.

18 U.S.C. § 1964(c)

Section 1983 of the Civil Rights Act provides, in relevant part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983

STATEMENT OF THE CASE

How the Federal Questions Were Presented

Jurisdiction was invoked pursuant to 28 U.S.C. § 1331 because the Complaint states claims arising under the Fourteenth Amendment of the United States Constitution and the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 ("RICO"). The District Court also had jurisdiction over the RICO claim pursuant to 18 U.S.C. 1964(a),(c). The District Court had supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367.

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 because plaintiffs appealed from the District Court's final judgment entered on September 19, 2001 disposing of all claims. Timely notice of appeal was filed on October 18, 2001.

Statement of the Facts

Plaintiff landowners sued for redress of substantial deprivation of their properties by New Morgan Borough, Berks County, Pennsylvania. Since the complaint was dismissed on Rule 2(b)(6) grounds, the allegations in the Complaint are taken as true.

Thus, defendants Raymond Carr and his entity Morgantown Properties, Inc., ("Carr"); in concert with their tenants and employees

public officials William and Judith Betze, Robert and Carolyn Williams and Cheryl Conkel, operate and control the Borough, including its zoning processes and actions, for their own private benefit. (Compl. ¶ 1, 4, App. 00113a, 00116a).

Plaintiffs have been, and continue to be, injured by defendants' actions to promote, permit and facilitate noxious and unreasonable land uses in New Morgan Borough. (Compl. ¶ 2, App. 00114-5a).

Carr owns and controls the Borough. In 1985, he purchased 3,499 acres then located in Caernarvon and Robeson Townships. (Compl. ¶ 10, App. 00118a). At that time, the area was a mostly rural farming community. The plaintiffs enjoyed their expected and expectable use of their residential properties.(Compl. ¶ 10, Ap. 0118a).

Carr sought permission from Caernarvon Township to establish a trash-to-steam plant on the land. (Compl. ¶ 11, App. 00118a). The Township rejected this proposal due to the serious deleterious effects on the community it promised. Not to be deterred, Carr circumvented the rejection of his plan by the Township and incorporated his land as New Morgan borough. This action is not at issue as such, but it is crucial background. (Compl. ¶ 12, App. 00118a).

Carr has operated the Borough as a fiefdom for his benefit. (Compl. ¶ 14, App. 00119a). By his ownership of all the land, Carr restricted residency and therefore public office in the Borough. All the officials in the Borough are and have been his family members,

employees and tenants. (Compl. ¶ 13, App. 00118a). At least three of the seven "borough council members" are directly employed by Carr or Morgantown. Given Carr's control over Morgantown, the land and the public officers, Carr has enjoyed carte blanche to act to substantially deprive plaintiffs' property solely for his own economic benefit. (Compl. ¶ 14, App. 00119a)

Carr, with the others, has promoted and erected in New Morgan a massive accumulation of unreasonably similarly noxious and objectionable uses adjacent to or nearby plaintiffs' properties. (Compl. ¶ 17, App. 00120a) These include a 500 acre landfill, a leachate treatment plant, and a private prison. Id. Additional noxious land uses, including, a trash-to-steam incinerator plant, a race track and a $17 million tile factory have also been permitted and contracted for.

These uses have already imposed, and will impose, a wide range of serious adverse effects on plaintiffs, which include, but are not limited to, inadequate controls allowing noxious landfill odors, loud and disruptive noises, discharge of raw leachate into a stream, trash hanging from trees on local roads, damaged streets, and broken windshields and other property. (Compl. ¶ 19, App. 00121a). The result is inhumane and uninhabitable living conditions. In turn this has caused a chronic, continuing devaluation of the plaintiffs' property values. (Compl. ¶ 19, App. 00121a).

The landfill operates to Carr's and his colleagues' profit. The

landfill pays royalties to Carr. In addition, to divert to Carr a state mandated community impact fee, Carr "sold" land to the Borough for $17 million, an inflated price. (Compl. ¶ 18, App. 00120a) Moreover, since Carr controls the Borough, he still controls the 500 acres owned by the Borough. The money paid to Carr came solely from the proceeds of bonds issued by New Morgan backed only by the impact fee income stream. Id. Of the Borough's approximately $1.7 million budget, $1.4 million goes to service those bonds. Id. In sum, Carr and Morgantown funnel nearly all of the public impact fees generated from the landfill operations, which is also nearly the entire New Morgan operating income, to themselves. This arrangement amply shows that New Morgan has been operated to serve defendants' financial gain. Id.

Moreover, there is reason to expect the same or similar procedure is, or will be, used to funnel additional money from the operation of the planned noxious land uses to the defendants. If the tile plant is constructed, Carr and Morgantown, through New Morgan, will receive approximately $1.00 per ton of ash waste brought into New Morgan. (Compl. ¶ 20, App. 00121a)

The effects of the planned future land uses will further devastate plaintiffs. Pollution, noise, further devaluation of property, air and water contamination, and serious danger to the community are but a few of the adverse effects from these uses.

REASONS FOR GRANTING THE WRIT

ARGUMENTS

This Court's action is required because:

The Third Circuit rule that the protection of property rights from being taken without substantive due process does not apply to impacts of actions of political subdivisions beyond their border is an unwarranted deviation from this Court's jurisprudence relating to protection of property rights from deprivation by government. The Third Circuit's rule creates a bright line inconsistent with the theme of the cases decided by this Court. Specifically, the Third Circuit rule disobeys this Court's admonition that the needs of the public (however defined) should not be imposed unduly on individuals, but should be borne by the community as a whole.

The Third Circuit rule is in conflict with the "investment backed expectation" rule defining property rights to be protected, and with the due process protection defined by this Court. It will inhibit victims of property deprivation from the opportunity to even develop a record to show a degree of depreciation requiring invalidation unless compensated.

To protect this Court's decisional rules where the Third Circuit is in conflict with other circuits, RICO's protection of property

extends to property interests such as the plaintiffs'. This Court's decision in National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994), and the jurisprudence of the Court in giving full thrust to RICO, e.g., Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 489, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985), mandates that parties be permitted to show that the impact on their property rights of a RICO racketeering enterprise is compensable.

The Third Circuit bright line test is in conflict with the holding of the Fourth Circuit in Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc., 18 F.3d 260 (4th Cir.1994), which held that a RICO claim may be brought for indirect harms that are proximately caused by the defendant's bad acts.

Thus, because the holding of the Third Circuit is in conflict with this Court's precedent and create conflict among the Circuit Courts, the Court should grant the plaintiffs' Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The central, stark and simple issue in this case is whether this Court's property protection interests extend to governmental deprivation of the property interest in maintaining existing uses, not just in expansion? The question is whether what is sauce for the goose is sauce for the gander? Can government, regulating and operating

businesses, with impunity, enrich itself by acting and regulating, deprive neighbors of the value, use and enjoyment of their properties, consistent with the due process protection of the Fifth Amendment. While some authoritarian governments may see themselves free to intrude on property ownership to extinction, such a situation is not tolerated in our Constitution, this Court has established that such action is not acceptable, whether it is conducted through regulation or physical seizure.

In the face of denial of the existence of such a right based on the internal jurisdictional line of a local government, this Court's intervention is therefore essential to curtail this universally recognized wrong and protect the rights of individual property owners against harms inflicted by individuals who shroud themselves in the veils of government.

ARGUMENT

This Court has established that restriction on enjoyment of private property rights is justifiable and necessary to a moderate degree. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631. However, the prevalence of unbridled restriction, self-centered motivation, the lack of necessity and special attributes, negates the government's health and welfare power. *Id.*

In this case, an individual and his company (Carr) were allowed to establish a wholly owned local government (a borough)

under since discarded Pennsylvania law. That action is not at issue, but is important background. Carr, owning all the land in the borough, utilized the Borough to create and maintain, directly and through sales, royalty arrangements, and the use of local zoning and other regulatory power, noxious nuisance activities such as landfills, prisons, and, at least proposed, racetracks and plastic recycling operations. However, no one lives in this borough (except for approximately 18 tenants all renting from Carr). Thus, all of the income realized from these activities flows to Carr; while all the serious adverse effects operate to drastically burden neighboring property owners deny the normal use of their residential properties and reduce their value.

The Third Circuit denied the Fourteenth Amendment Challenge, stating property rights do not protect against actions of abutting governments. Conceptually and practically, the Third Circuit deviated from the logical and policy requirement characterized as actionable by this Court in Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and the Penn Central line of cases, in that the governmental body, which effectively is an alter ego of the single property owner, is the direct financial beneficiary of the deprivations it visits on its neighbors. The underlying issue is the difference (which should be irrelevant) that in most cases (but not all) the limitations work to block commercial exploitation of the property, whereas in this instance, the deprivations work to preclude the continuation of enjoyment and diminish values.

These differences require a heightened scrutiny and a heightened prohibition. The Court, in its development of the limits of governmental body power to impede use of property, should protect not only the economic exploitation of the property; but, even handedly to the value and use of the property.

The Court has already indicated that the latter holds in such cases as Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), where the Court held that Ms. Dolan's use of her land was important enough preclude the municipality from taking it. However, Tigard had the element of financial exploitation by the private property owner, and also involved physical taking.

The question presented by this case is therefore, whether government may, not only its regulatory powers, but its entrepreneurial activities, substantially interfere with neighbors' use and enjoyment of their land, and, as this Court has eloquently stated, visit the impact of that governmental action on the powerless, rather than sharing it among its own public.

It is submitted that the Third Circuit has failed to follow the substantive due process law as developed by this Court, even though the Third Circuit itself has applied those decisions to regulations prohibiting particular uses of economic development

I. THE THIRD CIRCUIT DEVIATED FROM THIS COURT'S HOLDINGS PROTECTING THE FUNDAMENTAL INTEREST IN THE USE, ENJOYMENT AND VALUE OF THEIR PROPERTY.

Defendants, acting under the color of state law, have deprived plaintiffs of property interests through the use of arbitrary or capricious government action. This appears to violate the Fourteenth Amendment substantive due process guarantee.

The District Court and the Third Circuit opinions, in different ways, avoided the issue by semantics. The District Court simply stated the appellants have no property interest, despite their obvious real estate holding. It asserted that there was no "property interest" in the action of a neighboring government, thereby stating a conclusion under the guise of reasoning. The Third Circuit, apparently acknowledging the defect, avoided the issue. It stated the semantic result more explicitly; while not justifying its conclusion. It held that a property interest is not protected against zoning action of a neighboring community, and then equated that conclusion with the statement there is no protected property interest. Again, this had the effect of ducking the question.

The Circuit Court opinion thereby ignores the significance and meaning of this Court's decisions, which the Third Circuit had previously acknowledged and applied. Specifically, the Circuit Court ignored the teaching of Penn Central. In Penn Central, this Court

answered the question "when do "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons?" It held that the test for whether a regulation effectuates a taking requires analysis of "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465, 1475 (U.S. 2002). Tahoe reaffirmed this standard.

Penn Central is not limited to actions by the local government against properties within its physical jurisdiction; nor is there any jurisprudence of this Court so limiting the effect of a governmental action taking property. Nor is there any rationale consistent with this Court's teachings for doing so.

The effect of actions within the jurisdiction on properties outside the jurisdiction can be just as devastating and effect the same deprivation of the investment backed legitimate property rights and expectations, which this Court has required be honored.

Thus, the bright line drawn by the lower court limiting the effect of this Court's decisions is inconsistent and incompatible with the purpose of this Court's jurisprudence.

This is particularly true where the action is taken by state actors in a governmental subdivision located within the same state as the subdivision in which the injured plaintiffs are located. Both are subject to the same state law, and, therefore, however subdivided, analytically and constitutionally within the jurisdiction of the same actor, the state. (however it chooses to allocate its power and responsibilities within itself). Concretely, that the state allows a line to be drawn between New Morgan Borough and the surrounding townships, does not insulate the state, as such, from the responsibility for what one of those jurisdictions does to citizens and property located in the adjoining jurisdiction.

This is consistent with this court's holdings, and inconsistent with the Third Circuit's decision herein. Moreover, it moves the law in the opposite direction of the prevailing jurisprudence. *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001)("Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred"); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)(partial regulatory taking does not relieve State of duty to compensate landowner for that portion of property interest taken); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)(State could not, without paying compensation, condition grant of permission to rebuild house on property owners' transfer to public of easement across beachfront property).

The Third Circuit in stating a rule, also misstates the facts, ignoring the commercial actions of the defendants. It implicitly treats as irrelevant the actions of the government in support of the commercial interests of its owners, who are also the controllers of the governmental body. The Third Circuit thus allows commercial interests, which place the governmental actor in a more dubious role, which actually require a higher degree of protection. In fact, where the governmental body (both explicitly and implicitly) acts to realize income from commercial activities conducted at the expense of its neighbors, the adverse effect is just as clear as where the neighbors are in the jurisdiction, and are not caused by the zoning.

In short, there can be circumstances under this Court's jurisprudence where the effect on neighbors is an element of deprivation of substantive due process. Since the Third Circuit has elected to narrow this Court's holdings in Penn Central, Lucas and Nollan, and to ignore the teaching of Penn Central, reiterated in Tahoe, intervention by this Court is required.

II. THE THIRD CIRCUIT'S HOLDING THAT DEFENDANTS' ACTIONS DID NOT PROXIMATELY CAUSE PLAINTIFFS' INJURIES IS IN CONFLICT WITH THIS COURTS' STANDARDS AND CREATES CONFLICT WITH THE HOLDING OF OTHER CIRCUITS.

The Third Circuit held that the "plaintiffs failed to prove that the defendants' actions proximately caused the alleged injury to the plaintiffs' property" because the diminution in plaintiffs' property values was not "directly assessed or measured from defendants' extortionate acts." (Exhibit A at 2). This is in conflict with holdings in other circuits. The plaintiffs' injury is not required to be "directly caused" by the RICO violation. Hecht v. Commerce Clearing House, Inc., 897 F.2d 21 (2d Cir.1990); Zervas v. Faulkner, 861 F.2d 823 (5th Cir.1988); Sperber v. Boesky, 849 F.2d 60 (2d Cir.1988). Indirect causation may be adequate. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 272-73 n. 20 (1992)("our use of the term "direct" should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text."). Indeed, as noted by the Seventh Circuit, this Court has "observed . . . that it did not mean to preclude all possibility of recovery for injury that was transmitted indirectly." Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257 (7th Cir. 1995)(citing Holmes).

Moreover, the Fourth Circuit in Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc., 18 F.3d 260 (4th Cir.1994), expressly

allowed a suit for derivative damages under the RICO Act. There a telephone company was allowed to bring a RICO suit against business competitor for indirect damages derived from defendants' misinformation campaign directed at plaintiffs' customers. There, as here, although indirect, the plaintiffs' damages were caused by the defendants' illegal acts, and proximately is not foreclosed at the preliminary stage. Thus, the Third Circuit's decision is not only against precedent, but creates a conflict among the Circuit Courts.

"Standing to assert RICO claims requires that the alleged RICO violation proximately caused a plaintiff's injury, i.e., the violation is not too remote from the injury." Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 443 (3d Cir. 2000).[1] "[T]he concept of proximate cause [in RICO cases] cuts off liability for those damages only distantly caused by a defendant's bad acts." Newton v. Tyson Foods, Inc., 207 F.3d 444, 447 (8th Cir. 2000). "The formal factors of RICO causation. . . . are: (1) the directness of the injury - the more

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[1] Apart from alleging a proximately caused injury, a RICO plaintiff must allege: "(1) The existence of an enterprise affecting interstate commerce; (2) that the defendant was employed by or associated with the enterprise; (3) that the defendant participated either directly or indirectly in the conduct or the affairs of the enterprise; and (4) that he or she participated through a pattern of racketeering activity that must include the allegation of at least two racketeering acts. Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165 (3d Cir. 1989).

indirect the injury, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to [defendant's wrongdoing], as distinct from other, independent, factors;(2) the difficulty of apportioning damages among potential plaintiffs - allowing recovery by indirectly injured parties would require complicated rules for apportioning damages; and, (3) the possibility of other plaintiffs vindicating the goals of RICO--direct victims could generally be counted on to vindicate the policies underlying RICO in a better manner than indirect victims." Allegheny Gen. Hosp., 228 F.3d at 443 (internal quotes omitted).

The liberal pleading standard for RICO proximate causation was set forth by this Court in National Organization for Women, Inc. v. Scheidler, 510 U.S. 249 (1994):

> [G]eneral factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. Id. at 256.

Plaintiffs' "complaint must be sustained if relief could be granted 'under any set of circumstances that could be proved consistent with the allegations.'" Scheidler, 510 U.S. at 256 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)). Although this Court is presently further considering the application of RICO to

abortion clinic protests in Scheidler v. NOW, Operation Rescue v. NOW, Nos. 01-1118, 01-1119, this case presents a stronger claim because the motivation is economic whereas in the NOW cases presently before the Court the lack of economic motivation is a critical issue.

Here, the issue of RICO standing had previously been before the Court of Appeals. (Appendix D). Then, the Court reversed the District Court for dismissing the Complaint without affording plaintiffs an opportunity for discovery on the standing question. (Appendix D at 5). The Court of Appeals' previous opinion stated that: "The allegation that defendants had a financial interest in the landfill, if it is proven to be true, would confer standing on plaintiffs who are seeking to recover damages for their alleged injuries from the landfill." (Appendix D at 8); See also Views of Judge Cowen, Appendix D at 8 n.3.

The plaintiffs' Amended Complaint met the standard. It alleged that:

> 48. Plaintiffs have suffered loss of property caused by the extortion scheme, including loss of property value due to the adverse impacts of defendants' activities.
>
> 49. Defendants knew that the zoning of property

> for the noxious uses described would in fact lead to the development and operation of those uses, in part because defendants stood illegally to gain and are gaining financially from the operation of these facilities.
>
> 50. The defendants' extortionate acts described above were a direct proximate cause of plaintiffs' injuries, in that it was foreseeable to defendants that their extortion and control of the zoning board and other entities, with the purpose of zoning a pattern of noxious uses throughout New Morgan Borough, would create conditions that would be and are injurious to plaintiffs' property.(Complaint, ¶¶ 48-50, App. 00128a-129a).

Plaintiffs further allege that defendants have a financial interest in the landfill's ownership and operation, and will have such an interest in future planned projects. Complaint, ¶ 18, App. 00120a.

Defendants' acts of extortion, bribery and blackmail were actually steps in, and part of, the development of the noxious land uses of which plaintiffs complain. These RICO violations were themselves causes of the complained-of noxious land uses (and planned land uses) which have injured plaintiffs in their property. The violations continue

to permeate the operation of the landfill: Defendants are using the Borough government to funnel landfill profits to themselves.

Further, it was foreseeable that defendants' extortionate activities would allow the operation of a series of concentrated, noxious uses that would injure property and property values in neighboring properties. This injury is a direct result of defendants' zoning of noxious land uses and operation and control of these uses. Defendants exert sufficient influence and control over the uses - through zoning actions, fees, lease and bond payments - to be responsible for the injuries they directly cause.

Moreover, plaintiffs' property has been damaged as a target by defendants' acts in that, through control of the Borough's sham government by bribery, extortion and blackmail, defendants have subjected plaintiffs to the imposition of a collection of noxious, destructive and inappropriate activities without the protections of democratic land use controls - all for defendants' financial gain. Defendants, by extortion, bribery and blackmail, have deprived plaintiffs of a legitimate governmental process through which they might prevent or mitigate the complained-of noxious land uses. Indeed, plaintiffs (and others in their position) - with their ability to affect how defendants could use their land - were precisely the targets - intended victims of defendants' RICO-violative schemes.

As this discussion demonstrates, plaintiffs met the pleading

requirements of NOW v. Scheidler, *Supra*. Injury and proximate cause were adequately pleaded. It was only by compartmentalizing plaintiffs' allegations about defendants' racketeering activities and refusing to acknowledge that those activities comprise an interrelated whole that the lower court can characterize their conduct and plaintiffs' injuries as being two steps removed from each other. In reality, with regard to the proximate cause alleged here, there is no intervening cause, no lack of foreseeability and no lack of directness. Defendants' various RICO violations together constitute a seamless web leading to plaintiffs' injuries.

The District Court attempted to support its conclusion that plaintiffs' injuries are too indirect by stating that the fact finder will have to determine whether New Morgan's zoning decisions would have been the same absent the RICO violations. This is erroneous. The defendants did not just zone; they are partners. The Circuit Court did not adhere to this issue. Moreover, if plaintiffs prove that the RICO-violative zoning decisions caused their injuries, there would be no such loophole, because defendants' bad motive is sufficient. Even if relevant, however, the burden should be on defendants to show that they would have made the same decisions even in the absence of the RICO violations. Their credibility will be at issue. Moreover, since the Council members live in the Borough, it is counterintuitive to suggest they would pollute themselves unless extorted to do so. At the very least, the issue is a factual one and was improperly decided against plaintiffs on a motion to dismiss.

The District Court stated other grounds, but the Court of Appeals did not adopt them.

III. THE DISTRICT SHOULD HAVE GRANTED PERMISSION TO AMEND THE COMPLAINT.

The District Court refused permission to further amend the Complaint, apparently as a sanction against plaintiffs' counsel.

The proposed Amendment was tendered in October 2000, in connection with (but not as part of) correction of an amended complaint erroneously filed in March 2000. The Court of Appeals had directed that the District Court allow an Amended Complaint, and in March 2000, plaintiffs were permitted to do so, but due to an unsuspected computer glitch, the plaintiffs inadvertently filed an earlier version of the Amended Complaint. When the District Court later allowed a corrected amended complaint to be filed, plaintiffs then tendered a more elaborately updated Amended Complaint. The District Court struck this Complaint, and refused permission to file the updated Amended Complaint.

The updated Amended Complaint, which was refused, was responsive to developments in the law relating to substantive due process and RICO, as well as additional factual allegations, designed to meet the defendants' renewed motions to dismiss; further specifying

the plaintiffs' claims.

The District Court inexplicably concluded that counsel's bad faith was implicated, a conclusion which it later disavowed.

In these circumstances, the generally applicable law should have been followed by the District Court, and amendment should have been allowed. According to Federal Rule of Civil Procedure 15(a), leave to amend a Complaint "shall be freely given when justice so requires."

The District Court erred as a matter of law. The amendments to the Complaint which had been tendered would have addressed issues of the extent of the property deprivation under due process. The proposed updated Amended Complaint would have further specified the facts underlying the nature of the actions, and the deprivation effects on the plaintiffs as related to property deprivation. These additional facts had been held to be necessary by the Third Circuit. Thus it is clear that they were relevant and amendment to the Complaint should have been allowed.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request that a petition for Writ of Certiorari to the Third Circuit be granted.

Respectfully Submitted,

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APPENDIX

Appendix A

Tri-County Concerned Citizens Association
v.
Carr

47 Fed.Appx. 149,
3rd Cir.(Pa.)

RICO Bus.Disp.Guide 10,352
This case was not selected for publication in the Federal Reporter.

NOT PRECEDENTIAL

Please use FIND to look at the applicable circuit court rule before citing this opinion. Third Circuit Local Appellate Rule 28.3(a) and Internal Operating Procedure 5.3. (FIND CTA3 Rule 28.0 and CTA3 IOP APP I 5.3.)

Appeal from the United States District Court for the Eastern District of Pennsylvania (*150 D.C. Civil Action No. 98-cv-04184). District Judge: Honorable Ronald L. Buckwalter.

OPINION

ROTH, Circuit Judge.
**1 Plaintiffs Tri-County Concerned Citizens Association et al. appeal the final order of judgment of the United States District Court for the Eastern District of Pennsylvania, granting defendants Carr, *et. al.*'s Motion to Dismiss three federal claims pursuant to F.R.Civ.P. 12(b)(6), three state law claims pursuant to 28 U.S.C. §§ 1367(c)(3), and plaintiffs' Amended Complaint. Plaintiffs own land adjacent to New Morgan Borough where defendants plan to operate landfills and a

trash to steam plant.

The District Court had jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331 and §§ 1964 (RICO) and supplemental jurisdiction over the state claims pursuant to 28 U.S.C. §§ 1367(a). We have appellate jurisdiction of a final order granting a motion to dismiss pursuant to 28 U.S.C. §§ 1291. We exercise plenary review over complaints dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6). *See Ditri v. Caldwell Banker Residential Affiliates, Inc.*, 954 F.2d 869, 871 (3d Cir.1992) and *Breyer v. Meissner*, 214 F.3d 416, 421 (3d Cir.2000).
For the following reasons, we will affirm the judgment of the District Court.

In reviewing a motion to dismiss under F.R.Civ.P. 12(b)(6), the non-moving party is given the benefit of all reasonable inferences that can be drawn from the allegations in the complaint, and the court must accept these allegations as true. *Breyer v. Meissner*, 214 F.3d 416, 421 (3d Cir.2000) citing *Lake v. Arnold*, 112 F.3d 682, 642 (3d Cir.1997) and *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1367 (3d Cir.1992), cert. denied, 506 U.S. 1079, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993). Further, a motion to dismiss under F.R.Civ.P. 12(b)(6) should only be granted when it appears that the plaintiff can prove no set of facts that would entitle him/her to relief. *See Smith v. Mensinger*, 293 F.3d 641, 647 (3d Cir.2001) citing *Conley v. Gibson*, 355 U.S. 41, 45--46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Appellants raise four issues on appeal: (1) that the District Court erred in ruling that they had not asserted a protected property interest in their substantive due process claim, (2) that the District Court erred in dismissing their procedural due process claim, (3) that

the District Court erred in finding that plaintiffs had suffered no direct injury to sustain their RICO claim, and (4) that the District Court erred in refusing to allow them to amend their complaint.

First, to establish a substantive due process claim, plaintiffs must have been deprived of a protected property interest by arbitrary and capricious government action. *See DeBlasio v. Zoning Bd. of Adjustment,* 53 F.3d 592, 598 (3d Cir.1995). Although the District Court did find that appellants had alleged arbitrary and capricious government action in their Amended Complaint, the District Court further found that plaintiffs had not pled any property interest that would give rise to substantive due process protection.

Because the protected property interests claimed by appellants have not ever been held to have been violated by land use decisions made by a neighboring township, the District Court properly determined that the appellants had failed to allege a protected property interest.

Second, to establish a claim for denial of procedural due process, plaintiffs must have been deprived of a protected property interest by a person acting under the color of the law, and the state procedure for challenging that deprivation must not satisfy the requirements of procedural due process. *Parratt v. Taylor,* 451 U.S. 527, 537, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Since the District Court held that plaintiffs have suffered no violation of a protected property interest, their procedural due process claim fails on the first element. Moreover, even if they had suffered such a violation, adequate process exists in Pennsylvania to appeal land use decisions.

Third, to establish a RICO claim, plaintiffs must have suffered an injury to their business or property by reason of the alleged violation of §§ 1962 claim. Here, plaintiffs allege that they had suffered "loss of property value" due to defendants' extortion scheme. Plaintiffs argue that defendants' actions directly effected a loss in their property value by the "noxious businesses" on the abutting property. However, this is an "injury" that cannot be directly assessed or measured from defendants' alleged extortionate acts. Moreover, plaintiffs do not specify how their land has or would be injured. They simply state they would suffer injury by "noxious uses" of the land in question. The District Court concluded that in making this allegation, plaintiffs failed to prove that defendants' actions proximately caused the alleged injury to plaintiffs' property. We agree.

Finally, plaintiffs argue that the District Court erred in not allowing them to amend their complaint for a fourth time. The District Court determined that justice did not require a fourth amended complaint that was "incorrectly" filed. We will not alter that determination.For the foregoing reasons, we will affirm the judgment of the District Court.C.A.3 (Pa.),2002.

Appendix B

Tri-County Concerned Citizens Association
v.
Carr

2001 WL 1132227
E.D.Pa.,2001

BUCKWALTER.

MEMORANDUM

The procedural history of this ongoing fight between the incorporated municipality of New Morgan Borough and the residents of neighboring townships Caernarvon and Robeson was thoroughly documented in the Court's December 11, 2000 Memorandum which denied Plaintiffs' October 16, 2000 Motion for Leave to Amend Complaint. Since then, Plaintiffs' filed their December 7, 1998 Amended Complaint (the "Amended Complaint"), as instructed by the Court. [FN1] Presently before the Court is Defendants' Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, Defendants' motion will be granted.

FN1. Since December 2000, the Court also denied the following motions: 1) Plaintiffs' Motion for Reconsideration, Stay and Recusal; 2) Plaintiffs' Motion for an Evidentiary Hearing; and, 3) Plaintiffs' Renewed Motion for Leave to Respond.

I. FACTUAL BACKGROUND

Plaintiffs are owners of land abutting New Morgan Borough in Berks County, Pennsylvania, and an organization of citizens from

neighboring townships (collectively "Plaintiffs"). Am. Compl. P 1. Plaintiffs commenced this lawsuit in August 1998 against Morgantown Properties, Inc., New Morgan Borough, and six individuals, five of whom are officials of the Borough (collectively "Defendants"). Raymond Carr, one of the individual defendants, allegedly "owns or has interest in virtually all or completely all the land comprising 'New Morgan Borough.' " Id. at P 4. Morgantown Properties, Inc. is owned and operated by Carr. Id. The five officials are: William Betz, the mayor; Judith Betz, the president of the Borough Council and chairperson of the Borough Planning Commission; Robert Williams, a council member; Carolyn Williams, the treasurer and secretary of the council, and secretary of the planning commission; and Cheryl Conkel, the vice-president of the council and co-chair of the planning commission. Id.

In 1985, Carr and Morgantown Properties acquired over 3,000 acres of land located in Caernarvon and Robeson Townships, which was, at the time of purchase, a mostly rural farming community with a small urbanized area in Morgantown. Id. at P 10. Having unsuccessfully sought permission from Caernarvon Township to construct a trash-to-steam plant on the property, Carr then brought a petition in Pennsylvania state court to incorporate the land as a borough, thereby being able to claim independent legal status and promulgate land-use regulation within its boundaries. Id. at P 11-12. The propriety of the incorporation of New Morgan Borough is now well settled and beyond dispute. See In Incorporation of Borough of New Morgan, 527 Pa. 226, 590 A.2d 274 (Pa.1991) (affirming incorporation of borough over objections of twelve non- resident interveners, various amici, and Caernarvon and Robeson Townships), cert. denied, Caernarvon Township v. Morgantown Properties, 502 U.S. 860, 112 S.Ct. 179, 116 L.Ed.2d 141 (1991).

Appendix B

Carr allegedly conferred public offices on family members, friends, employees, and tenants. Am. Compl. P 13. Plaintiffs allege that Carr and Morgantown Properties "have effectively created a company town" and that "Carr controls the election and identity of any and all political persons eligible for holding public office ... in that each such person is a family member, employee, and/or a tenant of Carr, his enterprises, and the Borough itself, and among other things, are subject to firing and/or eviction if they fail to carry out Carr's wishes in all matters." Id. at P 15.

Through this extortionate control, Plaintiffs allege that "Defendants by their actions have caused to be erected, authorized, and threatened to erect virtually throughout 'New Morgan Borough' ... a massive accumulation of unreasonably noxious, abusive, destructive, and objectionable uses, imposing a wide range of adverse effects on their surrounding neighbors, for Carr's benefit." Id. at P 17. Specifically, Plaintiffs claim "Defendants, have been and are, threatening noxious uses such as ... a trash-to-steam incinerator, a race track, a leachate treatment plant in the [existing] landfill, a privately operated prison, and a $17 million tile factory. Id. at P 20. Notably, the Amended Complaint alleges "Morgantown Properties sold land to New Morgan Borough for $15 million, payable through bonds taken out by the Borough," so, in effect "of the Boroughs' approximately $1.7 million budget, $1.4 million goes to pay these bonds." Id. at 18. This alleged financial structure enables Carr and Morgantown Properties "to funnel money from the operation of the race track, detention center and industrial tile/ceramics factory." Id. Allegedly, as a result of Defendants' operations, Plaintiffs are subjected to "noxious odors, loud and disruptive noises, trash hanging from trees on local roads, damaged streets, and broken windshields and other property, constituting a public and private nuisance and giving rise to inhuman

living conditions and a chronic, continuing devaluation of property." Id. at P 19.

II. STANDARD OF REVIEW

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that, in response to a pleading, a defense of "failure to state a claim upon which relief can be granted" may be raised by motion. Fed.R.Civ.P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). The court must only consider those facts alleged in the complaint in considering such a motion. See ALA v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir.1994). The pleader must provide sufficient information to outline the elements of the claim, or to permit inferences to be drawn that these elements exist. Kost v. Kozakiewicz, 1 F.3d 176, 183 (3d. Cir.1993). A complaint should be dismissed if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

III. DISCUSSION

Plaintiffs set forth six counts in their Amended Complaint, three federal claims and three state claims. All three federal claims will be dismissed on the merits and the state claims will be dismissed pursuant to 28 U.S.C. § 1367(c)(3).

A. Substantive Due Process

Plaintiffs have alleged a denial of their constitutional rights to

substantive due process. The interests protected by substantive due process are roughly defined and the Supreme Court has yet to provide substantial guidance in this area. DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 598 (3d Cir.1995). However, the Supreme Court has stated that "the history of substantive due process 'counsels caution and restraint.' " Regents of University of Michigan v. Ewing, 474 U.S. 214, 229, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985), quoting Moore v. East Cleveland, 431 U.S. 494, 502, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). The Third Circuit has determined that a party making a substantive due process claim must prove that it was deprived of a protected property interest by arbitrary or capricious government action. See Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1290 (3d Cir.1993). Furthermore, the Third Circuit has explained that "a plaintiff must have been deprived of a particular quality of property interest," which, more specifically, must be one " 'encompassed by the Fourteenth Amendment.' " See DeBlasio, 53 F.3d at 600, quoting Acierno v. Cloutier, 40 F.3d 597, 616 (3d Cir.1994). Courts have also explained that although such property interests may be protected by the Constitution, "they stem from such sources as state law." MacNamara v. County Council of Sussex County, 738 F.Supp. 134, 141 (D.Del.1993), citing Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). "Although land ownership might initially appear to present a straightforward example of a protected property interest, it is far from clear that every impact on landownership caused by zoning regulations creates a right to process." MacNamara, 738 F.Supp. at 141, citing Developments in the Law--Zoning, 91 Harv.L.Rev. 1427, 1514 (1978).

Here, the issue presented is whether Plaintiffs have pled a property interest that is of the sort which warrants substantive due process protection. [FN2] In a cautious effort to be inclusive and

thorough, the Court credits Plaintiffs with arguing Defendants deprived or infringed upon the following interests: (1) the right to use and enjoy their land; (2) the right to be free from uncompensated takings; (3) the right not to be subjected to common nuisances such as odors, noise, pollution, dirt and other noxious and dangerous situations; (4) the right not to have their property values diminished; and (5) the right to own, use and enjoy "property that is not subject to a [neighboring jurisdiction's] sham government's sham zoning and permitting machinations." See Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 22-3 and 25-6; see also Pls.' Surrebuttal at 9 and 12.

FN2. The Court believes Plaintiffs have sufficiently alleged arbitrary and capricious government action in their Amended Complaint and will limit its analysis to the first part of substantive due process analysis.

The Court believes the first three of these "interests" essentially stand for the same proposition, however, the Court will try to parse them out and treat them separately. First, the Court has been hard pressed to find either controlling or persuasive authority which establishes a fundamental right in or allowed a party to base a substantive due process claim on the unfettered use and enjoyment of one's land. At least one other court has rejected a constitutional claim based on the allegation that a rezoned area has interfered with the use and enjoyment of a plaintiff's land. See MacNamara, 738 F.Supp. at 142-43 (dismissing plaintiffs case which was centered on the theory that the defendants' approval of an electrical power station on a parcel of land located near plaintiffs' property violated plaintiffs' constitutional rights). The Court finds no reason to depart from the limited authority on this issue.

Second, to the extent Plaintiffs have attempted to argue that the limitations placed on their use of their land constitute takings, they fail to make out a claim. The most apparent takings occur when the government has physically invaded one's land. See Keystone Bituminous Coal Ass'n v. Duncan, 771 F.2d 707, 712 (3d Cir.1985) aff'd, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). However, takings can also occur without physical invasion if the governmental action deprives a land owner of all economically viable uses of property. See Rogin v. Bensalem Twp., 616 F.2d 680, 692 (3d Cir.1980) (explaining that the Supreme Court will uphold the application of a zoning ordinance even if the new law prohibits a beneficial use to which certain parcels had been devoted). Here, Plaintiffs do not make any allegations of physical invasion or deprivation of all possible economic uses. Consequently, there is no basis for a takings argument in Plaintiffs' case.

Third, as to the claim that Plaintiffs have a right not to be subjected to common nuisances such as odors, noise, pollution, dirt and other noxious and dangerous situations, Plaintiffs again fail to raise a constitutionally protected interest. In Stop-Save Twp. Open Places, Inc. v. Bd. Of Supervisors, No. 96-7325, 1996 U.S. Dist. LEXIS 16998, at *13-16 (E.D.Pa.1996), a case in which the plaintiff made a claim closely resembling Plaintiffs' assertion of a right to be free from nuisance, Judge Waldman wrote "[t]here is no fundamental right in modern society to be free from increased traffic, noise or an incursion on open space ... [i]ncreased residential and commercial development is an inevitable fact of life in expanding suburban areas." Stop-Save, 1996 U.S. Dist. LEXIS 16998 at *13. Judge Waldman's observation rings true in this case. Plaintiffs, assuming their allegations are true, understandably are not pleased with the effects of a land fill, but rural areas are also becoming subject to change. The nuisances

which may result from these changes in land use may be actionable under state nuisance law, but they do not constitute violations of substantive due process.

Fourth, the Court believes diminution of property values does not give rise to substantive due process protection. See MacNamara, 738 F.Supp. at 142, citing BAM Historic District Association v. Koch, 723 F.2d 233, 237 (2d Cir.1983) (holding that a land use decision causing a decline in property values did not deprive a person of property within the meaning of the Fourteenth Amendment); see also Stop-Save, 1996 U.S. Dist. LEXIS 16998 at * 13, citing Fusco v. State of Connecticut, 815 F.2d 201, 205-06 (2d Cir.1987) (holding plaintiffs' claim that their property values decreased because of neighboring development did not constitute a deprivation of property rights protected by Fourteenth Amendment).

Finally, the Court is not sure what Plaintiffs mean when they assert the right to own, use and enjoy "property that is not subject to a [neighboring jurisdiction's] sham government's sham zoning and permitting machinations." See Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 26. Plaintiffs do not provide the Court with any statute or case law from which it can evaluate this substantive due process claim; the Court is fairly confident nothing of that sort exists. In summary, the Court does not believe any of the property interests Plaintiffs pled give rise to substantive due process protection. Accordingly, Plaintiffs' substantive due process claim will be dismissed.

B. Procedural Due Process

Plaintiffs have also alleged a denial of their constitutional rights to procedural due process. To establish a violation of procedural due process, Plaintiffs must establish two elements: (1) a person acting

under color of state law deprived them of a protected property interest and (2) the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 680 (3d Cir.1991), citing Parratt v. Taylor, 451 U.S. 527, 537, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Regarding the first element, Plaintiffs argue they have raised a constitutionally "protected interest in the ownership, use and enjoyment of their property." Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 26. As addressed supra, Plaintiffs have not raised a constitutionally protected interest. This determination alone could serve as a basis for dismissing Plaintiffs' procedural due process claim. See MacNamara v. County Council of Sussex County, 738 F.Supp. 134, 143 (D.Del.1993) (dismissing both a substantive due process claim and a procedural due process claim because the plaintiff failed to raise a constitutionally protected interest).

Assuming arguendo, Plaintiffs have established deprivation of a protected property interest, the question becomes can Plaintiffs show the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. Plaintiffs argue that the "sham" nature of New Morgan Borough precludes the existence of a "legitimate procedure for challenging the complained-of actions" and that "Pennsylvania law ... severely restricts both substantive rights and procedural remedies of persons situated like the [P]laintiffs." Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 27.
This argument carries no weight. The Third Circuit has conclusively held Pennsylvania's statutory scheme adequately protects the procedural due process rights of a plaintiff challenging a municipality's zoning decisions. See Rogin v. Bensalem Twp., 616 F.2d 680, 694-95 (3d Cir.1980) (upholding Pennsylvania's scheme for challenging zoning ordinances because it provided for a ministerial review of a

proposed use by a Zoning Officer, an appeal to the Zoning Hearing Board, and an appeal of that decision to the Court of Common Pleas); see also Taylor Inv., Ltd. v. Upper Darby Twp., 983 F.2d 1285, 1294-95 (3d Cir.1993) (remarking Pennsylvania's scheme for challenging zoning ordinances is consistent with due process); Omnipoint Communications, Inc. v. Penn Forest Twp., 42 F.Supp.2d 493, 507 (M.D.Pa.1999) (dismissing "procedural due process claim as the Third Circuit has determined that Pennsylvania's scheme for challenging zoning determinations satisfie[s] procedural due process"). Thus, the Court believes Plaintiffs fail to establish either of the two necessary elements of a due process claim. Accordingly, Plaintiffs' procedural due process claim will be dismissed.

C. RICO

Plaintiffs' final federal claim is a civil RICO claim. To prevail in a civil action for damages under RICO, a plaintiff must establish a violation of Section 1962, allege an injury to their business or property "by reason of" the alleged violation of Section 1962, and plead the requisite causal connection between the injury and the violation of Section 1962. E.g., Masnik v. Bolar Pharmaceutical Co. Inc., No. 90-4086, 1991 U.S. Dist. LEXIS 10138, *19-*20 (E.D.Pa. July 18, 1991), citing 18 U.S.C.1964(c). [FN3] The Supreme Court has determined that the phrase "by reason of" in Section 1964(c) requires a plaintiff to show the alleged RICO violations proximately caused the plaintiff's injury, meaning the violation can not be too remote from the injury. See Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); [FN4] see also Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 443-44 (3d Cir.2000) (upholding lower Court's dismissal of RICO claims because proximate cause was lacking); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 934 (3d Cir.1999)

(finding that plaintiffs failed to allege a compensable injury proximately caused by defendants' allegedly fraudulent and conspiratorial conduct sufficient to avoid dismissal under Fed.R.Civ.P. 12(b)(6)), cert. denied, 528 U.S. 1105, 120 S.Ct. 844, 145 L.Ed.2d 713 (2000).

FN3. Section 1964(c), the civil damages provision of RICO, provides the following:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

FN4. The proximate cause requirement the Supreme Court imposes on civil RICO claims is an aspect of standing rather than an element of a plaintiff's civil RICO prima facie case. See Allegheny Gen. Hosp., 228 F.3d at 443; see also Masnik at *21-*22. Plaintiffs argue the Third Circuit conclusively determined that Plaintiffs have standing under RICO in its December, 7, 1999 unreported Memorandum Opinion which reversed the Court's November 20, 1998 decision. The Court disagrees. Rather, the Third Circuit determined the Court improperly conducted its 12(b)(6) RICO analysis by relying on independent factual findings reached during the Court's 12(b)(1) analysis regarding Plaintiffs' constitutional claims. The
Third Circuit's prior opinion in this case does not bear weight on the analysis herein which the Court conducts independently of another analysis.

There are three factors of proximate cause in RICO:
(1) the directness of the injury--"the more indirect the injury, 'the more

difficult it becomes to ascertain the amount of a plaintiff's damages attributable to [defendant's wrongdoing], as distinct from other, independent, factors;' " (2) the difficulty of apportioning damages among potential plaintiffs--"allowing recovery by indirectly injured parties would require complicated rules for apportioning damages;" and, (3) the possibility of other plaintiffs vindicating the goals of RICO--"direct victims could generally be counted on to vindicate the policies underlying" RICO in a better manner than indirect victims. Allegheny, 228 F.3d at 443, quoting Steamfitters, 171 F.3d at 932, quoting Holmes, 503 U.S. at 268-69.

A threshold issue is whether Plaintiffs have alleged facts which, if taken as true, sufficiently establish proximate causation. Plaintiffs allege that Defendants' extortion scheme has caused Plaintiffs to suffer loss of property including "loss of property value." Pls.' Mem. in Opp'n to Defs.' Mot. to Dismiss at 37, quoting Pls.' Am.Compl.P 48. Plaintiffs also allege that "Defendants knew that the zoning of property for ... noxious uses ... would lead in fact to the development and operation of those uses, in part because defendants stood illegally to gain and are gaining financially from the operation of these facilities." Id., quoting Pls.' Am.Compl.P 49. Finally, Plaintiffs allege:

> the defendants' extortionate acts ... were a direct proximate cause of plaintiffs' injuries, in that it was foreseeable to defendants that their extortion and control of the Zoning Board and other entities, with the purpose of zoning a pattern of noxious uses throughout New Morgan Borough, would create conditions that would be and are injurious to plaintiffs' property. Id., quoting Pls.' Am.Compl.P 50.

Appendix B

1. The Directness of the Injury

This factor addresses the difficulty of ascertaining damages traceable to Defendants' conduct. See Allegheny Gen. Hosp., 228 F.3d at 443. Plaintiffs' chain of allegations has an inherent indirectness. Under Plaintiffs' logic, the cause of their injuries are the noxious businesses, not the alleged extortion, bribery and blackmail. The alleged extortion, bribery and blackmail merely had the effect of making the operation of noxious businesses possible. Further, assuming Defendants have a financial stake in the businesses, and the acts of the businesses can therefore be attributed to Defendants, the acts of the businesses are not in themselves predicate acts under RICO. This indirectness creates problems for a fact finder who would be required to determine the extent to which Defendants' alleged RICO violations affected Plaintiffs' property as opposed to other factors. First, a fact finder would have to determine whether the zoning of New Morgan Borough would have been the same absent Defendants' alleged RICO violations. It is possible the zoning which permits the noxious businesses would have been approved even if Defendants did not exert illegal pressures. Second, other factors would have to be considered when assessing the damage to Plaintiffs' property such as, inter alia, zoning and uses in jurisdictions other than New Morgan Borough, standard depreciation of Plaintiffs' homes, and other market forces such as supply and demand. Consequently, tracing a value back to the alleged RICO violations would be extremely difficult and impractical.

2. The Difficulty in Apportioning Damages Among Plaintiffs

As to this second factor in the proximate cause analysis, apportioning damages among Plaintiffs would be as impractical as ascertaining damages traceable to Defendants' conduct. Allowing recovery by the indirectly injured Plaintiffs would require complicated

rules for apportioning damages which would likely include, inter alia, valuation of properties before and after the alleged RICO violations, identification and valuation of other sources of positive and negative effects on Plaintiffs' properties, and establishment of ownership identification and property histories. The necessary degree of complexity and problems of apportionment are significant.

3. The Possibility of Other Plaintiffs Vindicating RICO's Goals

Finally, it is unclear whether the individuals targeted by the alleged extortion, bribery and blackmail--who are not identified in Plaintiffs' Amended Complaint--could recover damages from Defendants. The Court is unaware of any case brought by those alleged victims, which suggests the alleged victims are not likely to vindicate the policies underlying RICO.

In summary, while Plaintiffs may be the only willing prosecutors of Defendants' alleged RICO violations, the indirectness of Plaintiffs' injuries and the difficulty in apportioning damages among Plaintiffs suggests proximate cause is lacking. Accordingly, Plaintiffs' RICO claim will be dismissed.

D. State Claims

Considering the Court will dismiss Plaintiffs' substantive due process, procedural due process and RICO claims, there will be no federal anchor claims upon which original subject matter jurisdiction may be based. Pursuant to 28 U.S.C. § 1367(c)(3), the Court will dismiss the pendent state law claims as well. See Markowitz v. Northeast Land Co., 906 F.2d 100, 106 (3d Cir.1990) ("the rule within this Circuit is that once all claims with an independent basis of federal jurisdiction have been dismissed the case no longer belongs in federal

court"), citing Lovell Mfg. Corp. v. Export-Import Bank of the United States, 843 F.2d 725, 734 (3d Cir.1988).

IV. CONCLUSION

For the reasons set forth above, the Court will grant Defendants' Motion to Dismiss and Plaintiffs' Amended Complaint will be dismissed in its entirety.
An appropriate Order follows.

ORDER

AND NOW, this 18th day of September, 2001, upon consideration of Defendants' Joint Motion to Dismiss (Docket No. 59) and Plaintiffs' response (Docket No. 61), et cetera, it is ORDERED Defendants' motion is GRANTED. Plaintiffs' Amended Complaint is dismissed in its entirety.

This case is CLOSED.

Appendix C

Tri-County Concerned Citizens Association
v.
Carr

1998 WL 966019
E.D.Pa.,2001

MEMORANDUM

BUCKWALTER, J.

In this latest skirmish between the incorporated municipality of New Morgan Borough and the residents of neighboring townships Caernarvon and Robeson, five individually named plaintiffs and an association of citizens residing in the area surrounding New Morgan Borough have filed a putative class action on behalf of all persons owning property and/or residing within one mile of the borough. See Compl. ¶¶ 2-3. In response to their allegations of various federal constitutional deprivations and a number of other statutory and state law claims, the eight named defendants, represented by three sets of counsel, have moved this Court to dismiss the claims pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6).

After a careful review of the parties' submissions, the Court concludes that Plaintiffs lack Article III standing to assert any of the federal constitutional claims (which additionally suffer from unripeness) and thus,

the Court lacks subject matter jurisdiction over those claims. Plaintiffs additionally lack statutory standing under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., and thus, have failed to state a claim upon which relief can be granted. Finally, in the absence of any federal anchor claim, the Court declines to exercise supplemental jurisdiction over Plaintiffs' pendent state law claims. Accordingly, Defendants' motions are GRANTED and the complaint is dismissed in its entirety without prejudice.

I. BACKGROUND

Plaintiffs are property owners who reside adjacent to the community of New Morgan Borough in Berks County, Pennsylvania. They commenced this lawsuit in August 1998 against a limited partnership, an incorporated municipality, and six individuals, five of whom are officials of the municipality. Raymond Carr allegedly "owns, or has interest in, virtually all or completely all of the land comprising New Morgan Borough." Compl. ¶ 4. Morgantown Properties, a limited partnership, is owned and operated by Carr, and New Morgan Borough is the name of the incorporated entity. See id.; see also Defs. Carr and Morgantown Properties' Mem. (Exhibit A thereto). The five officials ("Public Officials") are: William Betz, the mayor; Judith Betz, the president of the Borough Council and chairperson of the Borough Planning Committee; Robert Williams, a council member;

Carolyn Williams, the treasurer and secretary of the council, and secretary of the planning committee; and Cheryl Conkel, the vice-president of the council and co-chair of the planning committee. See Compl. ¶ 4. Plaintiffs' complaint essentially recounts the saga of land development in New Morgan Borough from the perspective of a concerned neighbor and raises the following seven claims: 42 U.S.C. § 1983 claims for a violation of their substantive and procedural due process rights (counts I and II); a RICO claim (counts III); an inverse condemnation claim for an unconstitutional taking without just compensation (counts IV); a claim entitled, "Arbitrary Exercise of Zoning" (count V); a claim brought pursuant to Article I, §§ 1, 26, and 27 of the Pennsylvania Constitution (count VI); and common law nuisance (count VII).
*2 Some thirteen years ago, Defendants Carr and Morgantown Properties acquired over 3,000 acres of land located in Caernarvon and Robeson Townships, which was, at the time of purchase, a mostly rural farming community with a small urbanized area in Morgantown. See Compl. ¶ 10. Having unsuccessfully sought permission from Caernarvon Township to construct a trash-to-steam plant on the property, Carr then brought a petition in Pennsylvania state court to incorporate the land as a borough, thereby being able to claim independent legal status and promulgate land-use regulation within its boundaries. See id. ¶ 11-12. The propriety of the incorporation of New Morgan Borough is now

well settled and beyond dispute. See In re Incorporation of Borough of New Morgan, 590 A.2d 274(Pa.) (affirming incorporation of borough over objections of twelve non-resident intervenors, various amici, and Caernarvon and Robeson Townships), cert. denied sub nom., Caernarvon Township v. Morgantown Properties, 502 U.S. 860 (1991).

Then, Carr allegedly conferred public offices on family members, friends, employees, and tenants. See Compl. ¶ 13. This leads Plaintiffs to contend that these officers are "sham officers of a sham Borough ... controlled by Carr." Id. ¶ 5. Plaintiffs allege that Carr and Morgantown Properties "have effectively created a company town" and that "Carr controls the elections and identity of any and all political persons eligible for holding public office ... in that each such person is a family member, employee, and/or a tenant of Carr, his enterprises, and the Borough itself, and among other things, are subject to firing and/or eviction if they fail to carry out Carr's wishes in all matters." Id. ¶ 15. Through this extortionate control, Plaintiffs allege that "Defendants have erected, authorized, and threatened to erect virtually throughout his property ... a massive accumulation of unreasonably noxious, abusive, destructive, and objectionable uses, imposing a wide range of adverse effects on their surrounding neighbors." Id. ¶ 17. Defendants have erected a landfill and allegedly plan to

construct a "trash-to-steam incinerator, a commercial gambling operation, i.e., a ractrack, a leachate treatment plant in the landfill, and a privately operated prison." Id. ¶ 20. Citing "noxious odors, loud and disruptive noises, trash hanging from trees on local roads, damaged streets, and broken windshields and other property, constituting a public and private nuisance and giving rise to inhuman living conditions and a chronic, continuing devaluation of property," id. ¶ 19, Plaintiffs allege that Defendants' actions are not warranted by any legitimate governmental purpose but rather, are motivated by the illegal and inappropriate motivation of maximizing profits for Carr and Morgantown Properties, see id. ¶ 22.

Indeed, it is incontrovertible that the Borough undertook development of the land through the adoption of a comprehensive plan, a zoning ordinance, and subdivision and land development ordinances. See Defs. Carr and Morgantown Properties' App. (Exhibits 1-3 thereto). Pursuant to these regulations, a tract of land was set aside for the operation of a landfill by Browning Ferris Industries under the supervision of the Pennsylvania Department of Environmental Protection. See id. (Exhibit 4 thereto); Defs. Public Officials' Mem. (Exhibits C and D thereto). While Defendants have denied that there is any proposal to construct a trash-to-steam plant on the land, the minutes of the Borough Council

and Borough Planning Committee meetings and the various real estate transactions documents indicate that consideration is currently underway for a motor sports park to be owned and operated by Formula Motorsports, Inc., a juvenile detention center/boarding school to be owned and operated by Cornell Corrections, Inc., and a leachate treatment plant. See Defs. Carr and Morgantown Properties' App. (Exhibits 5-8 thereto); Defs. Public Officials' Mem. (Exhibits E and F thereto). Significantly, the named defendants appear to have neither any ownership interest in, nor any business connection to, the uses intended by these operations. See Defs. Carr and Morgantown Properties' App. (Exhibits 9 and 10 thereto).

II. DISCUSSION

A. Standards of Review

Defendants bring their motions by way of Fed.R.Civ.P. 12(b)(1) for lack of subject matter jurisdiction, and 12(b)(6) for failure to state a claim upon which relief can be granted. "When a motion under Rule 12 is based on more than one ground, the court should consider the 12(b)(1) challenge first because if it must dismiss the complaint for lack of subject matter jurisdiction, all other defenses and objections become moot." In re Corestates Trust Fee Litig., 837 F.Supp. 104, 105 (E.D.Pa.1993) (Buckwalter, J.), aff'd, 39 F.3d 61 (3d Cir.1994). Accord Bell v. Hood, 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be

granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.").

In ruling on a motion to dismiss pursuant to Rule 12(b)(1), "a district court is not limited to the face of the pleadings. Rather, as long as the parties are given an opportunity to contest the existence of federal jurisdiction, the court 'may inquire, by affidavits or otherwise, into the facts as they exist.' " Armstrong World Indus., Inc. v. Adams, 961 F.2d 405, 410 n. 10 (3d Cir.1992) (quoting Land v. Dollar, 330 U.S. 731, 735 n. 4 (1947)) (citations omitted). By contrast, in reviewing a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the district court must accept all well- pleaded allegations in the complaint as true and view them in the light most favorable to plaintiffs. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir.1997).

B. The Federal Constitutional Claims Must Be Dismissed (Counts I. II. and IV)

Among the grounds Defendants advance in support of their Rule 12(b)(1) challenge against the due process and takings claims include one for lack of standing under Article III of the United States Constitution. See Def. New Morgan Borough's Mem. at 10-13. The Court agrees and declines to exercise subject matter jurisdiction in the absence of constitutional

standing.

Standing imports justiciability and thus, is properly brought under Rule 12(b)(1) for lack of subject matter jurisdiction. See 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, Civil 2d, § 3531.15, at 95 n. 9 (2d ed.1984). Whether the plaintiff has made out a "case or controversy" against the defendant within the meaning of Article III of the United States Constitution "is the threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975).

"[T]he standing question is whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Id. (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)) (emphasis in original). It is well settled that Article III standing consists of three distinct elements: *4 First, the plaintiff must have suffered an "injury in fact"--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of.... Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

United States v. Hays, 515 U.S. 737, 742-43

(1995) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (footnote, citations, and internal quotation marks omitted)); accord Davis v. Philadelphia Hous. Auth., 121 F.3d 92, 95-96 (3d Cir.1997).

Plaintiffs simply contend that they have made the necessary averments in the pleading to withstand Defendants' challenge for lack of standing. See Pl. Mem. at 31-34. The facts of the case, however, lead this Court to rule otherwise. Because Plaintiffs cannot establish the necessary "causal connection between the injury and the conduct complained of," they lack Article III standing to assert the federal constitutional claims.

The gist of Plaintiffs' claims is that governmental entities enacted ordinances and regulations governing land-use within the boundaries of New Morgan that in some way affected their interests in property outside the confines of the borough. None of the named plaintiffs (or any members of the putative class) are residents of, or own any property in, New Morgan Borough. Consequently, their property is beyond the reach of the various ordinances and regulations promulgated by the Borough Council and the Planning Committee and thus, Plaintiffs cannot properly bring challenges to these ordinances as landowners.

Moreover, the "adverse effects" alleged by Plaintiffs are too attenuated from the actions of the governmental actors here to impute

liability onto them. It is not the borough or its officials that are causing the "noxious odors, loud and disruptive noises, trash hanging from trees on local roads, damaged streets, and broken windshields and other property, constituting a public and private nuisance and giving rise to inhuman living conditions and a chronic, continuing devaluation of property." The named defendants here do not possess any ownership interest in, nor any business connection to, the uses being complained of by Plaintiffs. All the municipality did was to designate the intended uses for the respective tracts of land, which was well within their authority. It is the subsequent operation of these uses that would give rise to Plaintiffs' claims. Plaintiffs may have suffered injuries (or may be threatened with injuries) for which relief may be available, but these injuries are not fairly traceable to the actions of these defendants.

This lack of legal nexus between the application of the land-use regulations at issue and Plaintiffs' property interests renders Plaintiffs unable to demonstrate the direct causal connection necessary to satisfy the second element of constitutional standing. It must be remembered that not every infringement to one's property interests rises to the level of a constitutional claim and that some annoyances are adequately addressed by the common law.

Appendix C

Defendants additionally argue that the due process and takings claims are not yet ripe for adjudication and thus, must be dismissed for lack of subject matter jurisdiction under Article III of the United States Constitution. See Defs. Public Officials' Mem. at 7-13; Defs. Carr and Morgantown Properties' Mem. at 10-13; Defs. New Morgan Borough's Mem. at 26-27. Ripeness also imports justiciability and thus, is properly brought under Rule 12(b)(1) for lack of subject matter jurisdiction. See Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 n. 18 (1993) ("We have noted that ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."); Taylor Inv., Ltd. v. Upper Darby Township, 983 F.2d 1285, 1290 (3d Cir.), cert. denied, 510 U.S. 914 (1993); see also 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure, Civil 2d, § 3532.1, at 130 (2d ed. 1984) ("Ripeness doctrine is rooted in the same general policies of justiciability as standing and mootness."). The "basic rationale" of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.
Abbott Labs. v. Gardner, 387 U.S. 136, 148-49

(1967). Thus, a claim of unripeness is invoked when a dispute has not yet matured into a "case or controversy" within the meaning of Article

III. While not entirely necessary for the disposition of Plaintiffs' federal constitutional claims, to the extent those claims address threatened injuries from the uses conditionally approved by the New Morgan Borough Council and Planning Committee, the Court agrees that Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), and its progeny, mandating that a plaintiff first seek relief through the procedures the state has provided for doing so, render those claims unripe for judicial review. That rule of finality applies to all of Plaintiffs' constitutional claims. See Taylor, 983 F.2d at 1290-92. Thus, those claims are dismissed on this alternative basis as well.

C. Plaintiffs Lack Statutory Standing to Assert the RICO Claim (Count III)

Defendants have moved to dismiss the RICO claim on a number of grounds. Chief among them is that Plaintiffs cannot establish that they have been injured in their property as a result of a pattern of racketeering activity or that they have been injured in their property independent of the alleged predicate acts. See Defs. Carr and Morgantown Properties' Mem. at 19-24; Defs. New Morgan Borough's Mem. at

28-37. Notwithstanding the unacceptably bare allegations of a RICO violation in the complaint, see Compl. ¶¶ 41-45, the Court agrees that Plaintiffs cannot establish a cognizable injury and thus, dismisses this claim on the merits.

In order to prevail on a civil action for damages under RICO, a plaintiff must establish a violation of § 1962, allege an injury to his/her business or property "by reason of" the alleged violation of § 1962, and plead the requisite causal connection between the injury and the violation of § 1962. 18 U.S.C. § 1964(c); see also Masnik v. Bolar Pharm. Co., Civ. A. No. 90-4086, 1991 WL 138331, at *6 (E.D.Pa. July 18, 1991) (Buckwalter, J.). Defendants' argument essentially finds its basis in principles of statutory standing. By contrast, statutory standing does not implicate any constitutional concerns. Rather, the question is "whether the so-called nexus ... between the harm of which this plaintiff complains and the defendant's so-called predicate acts is of the sort that will support an action under civil RICO." Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 286-87 (1992) (Scalia, J., concurring) (emphasis in original). That is, a plaintiff must establish that the damages that have occurred were proximately caused by a defendant's racketeering activity. See Sedima v. Imrex Co., 473 U.S. 479, 495-97 (1985) ("the plaintiff only has standing if, and can only

recover to the extent that, he has been injured in his business or property by the conduct constituting a violation"); Brittingham v. Mobil Corp., 943 F.2d 297, 304 (3d Cir.1991) ("the plaintiff must demonstrate that his injuries were proximately caused by that violation"). Hence, a civil RICO claim is subject to dismissal if it fails to allege either an adequate injury to business or property, or an adequate causal nexus between that injury and the predicate acts of racketeering activity.

As the Court's analysis above indicates, even assuming that Defendants have engaged in some kind of illegal racketeering activity, the chain of causation resulting in the alleged harm to Plaintiffs' property is too attenuated to satisfy the statute's requirement. At best, Plaintiffs have suffered a kind of derivative harm, which does not represent the kind of allegation that demonstrates injury flowing from the commission of the predicate acts. Accordingly, the RICO claim is dismissed.

D. The Court Will Not Exercise Jurisdiction Over the Pendent State Law Claims (Counts V. VI, and VII)

Plaintiffs' remaining claims all find their substantive basis in state law. As there are no federal anchor claims upon which original subject matter jurisdiction may be exercised, this Court dismisses the pendent

state law claims pursuant to 28 U.S.C. § 1367(c)(3). See Markowitz v. Northeast Land Co., 906 F.2d 100, 106 (3d Cir.1990) ("the rule within this Circuit is that once all claims with an independent basis of federal jurisdiction have been dismissed the case no longer belongs in federal court").

III. CONCLUSION

For the foregoing reasons, Defendants' motions are GRANTED and Plaintiffs' complaint is dismissed in its entirety without prejudice. An appropriate order follows.

ORDER

AND NOW, this 20th day of November 1998, upon consideration of Defendants' motions to dismiss and accompanying exhibits (Docket Nos. 3, 4, 5, and 6), Plaintiffs' response thereto (Docket No. 7), and Defendants' reply memoranda (Docket Nos. 8 and 9), it is hereby ORDERED that Defendants' motions are GRANTED. Plaintiffs' complaint is dismissed in its entirety without prejudice.

Appendix D

UNREPORTED - NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1219

TRI-COUNTY CONCERNED CITIZENS ASSOCIATION;
PATTY BRANN; KATHY BRILL; WILLIAM CRANSTON;
HOLLY HARTSHORNE; BARBARA MESSNER,

Appellants

v.

RAYMOND CARR; MORGANTOWN PROPERTIES, INC.;
WILLIAM BETZ; JUDITH BETZ; ROBERT B. WILLIAMS;
CAROLYN WILLIAMS; CHERYL CONKEL; NEW MORGAN BOROUGH

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 98-cv-04184)
District Judge: Honorable Ronald L. Buckwalter

Argued October 20, 1999

Before: SCIRICA, COWEN and MAGILL*, Circuit Judges

(Filed DEC - 7 1999

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*Honorable Frank J. Magill, U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix D

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Appendix D

OPINION OF THE COURT

COWEN, Circuit Judge

I.

Plaintiffs are property owners who reside adjacent to the community of New Morgan Borough in Berks County, Pennsylvania. Plaintiffs commenced this lawsuit in August 1998 against a limited partnership (Morgantown Properties, Inc.), an incorporated municipality (New Morgan Borough), and six individuals, five of whom are officials of the municipality. Raymond Carr allegedly owns, or has an interest in, virtually all or completely all of the land comprising New Morgan Borough. Morgantown Properties is owned and operated by Carr. The five officials are: William Betz (mayor); Judith Betz (president of the Borough Council and chairperson of the Borough Planning Committee); Robert Williams (council member); Carolyn Williams (treasurer and secretary of the Borough Council); and Cheryl Conkel (vice-president of Borough Council and co-Chair of Borough Planning Committee).

Plaintiffs' complaint is essentially taken from the perspective of a concerned group of neighboring citizens claiming injuries (i.e. diminution of property values and nuisance by noise dust, and odors) from the adjacent landfill and other various uses on adjacent properties (i.e. commercial gambling operation, racetrack, and privately owned prison). Plaintiffs have raised seven claims including: 42 U.S.C. § 1983 claims for violation of

substantive and procedural due process (Counts 1&2); a RICO claim (Count 3); and inverse condemnation claim for an unconstitutional taking without just compensation (Count 4); and various state law claims including common law nuisance (Counts 5-7).

The District Court granted defendants' motion to dismiss the complaint on standing and ripeness grounds. See Dist. Ct. Order and Mem. Nov. 20, 1998. The District Court entered the dismissal without affording the plaintiffs any discovery or an evidentiary hearing on the standing issue. The District Court denied plaintiffs' motion for leave to amend the complaint ruling that it would be futile. See Dist. Ct. Order Feb. 24, 1999. It also denied plaintiffs' motion for reconsideration.

In this appeal, plaintiffs argue that the allegations of the initial complaint were sufficient to invoke standing under Article III and RICO. Alternatively, plaintiffs argue that there was standing based upon the allegations raised in the proposed amended complaint and the motion for reconsideration. Defendants assert that plaintiffs have not satisfied the causation requirement of standing in either the initial or the amended complaint. Defendants essentially contend that the causation requirement to hold them accountable is not satisfied here because after the Borough issued a permit to Browning Ferris Industries (BFI) for use of the landfill two intervening events occurred: (1) the Pennsylvania Department of Environmental Protection (DEP) issued a permit for the operation of the landfill and (2) BFI owned and operated the landfill pursuant to DEP supervision. Defendants also contend that plaintiffs' claims are not ripe.

We will reverse and remand for further proceedings.

II.

Defendants argue that the District Court correctly dismissed the complaint here without affording plaintiffs any opportunity for discovery on the standing question. We find this argument unpersuasive.

In cases like this one "[t]he record must clearly establish that after [subject matter] jurisdiction was challenged the plaintiff had an opportunity to present facts by affidavit or by deposition, or in an evidentiary hearing in support of his jurisdictional contention." Berardi v. Swanson Memorial Lodge No. 48 of the Fraternal Order of Police, 920 F.2d 198, 200 (3d Cir. 1990) (citing cases). That is simply not the case here. In fact, just the opposite is true: the District Court dismissed the complaint without properly affording the plaintiffs any of these procedural safeguards.[1] Accordingly, we remand the case to the

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[1]In their briefs and again in a letter to the Court dated October 20, 1999, defendants argue that under Rule 12(b)(1)--even without affording plaintiffs any opportunity for discovery or an evidentiary hearing--the District Court nonetheless correctly found that plaintiffs did not have standing because their evidence of defendants' financial interest in the landfill simply was not credible. In support of their position, defendants have directed this Court's attention to several of our cases including Berardi v. Swanson Memorial Lodge No. 48 of the Fraternal Order of Police, 920 F.2d 198, 200 (3d Cir. 1990).

Berardi and its progeny do not support defendants' view. It is true that in Berardi this Court recognized that on occasion "a facially sufficient complaint may be dismissed before an answer is served if it can be shown by affidavits that subject matter jurisdiction is lacking." Berardi v. Memorial Lodge No. 48, 920 F.2d at 200. The Berardi Court, however, specifically cited the example of whether the plaintiff had met the amount-in-controversy requirement to establish subject matter jurisdiction in a diversity case. Id. at

District Court for discovery on the standing question.[2]

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200 (citing KVOS, Inc. v. Associated Press, 299 U.S. 269 (1937)).

That is obviously not the case here. This case involves rather complex standing issues under Article III and RICO, not relatively simple issues of subject matter jurisdiction like the amount-in-controversy or diversity-of-citizenship requirements. "One of the basic tenets of American jurisprudence is that procedural fairness requires that each party have . . . an opportunity to be heard at a meaningful time and in a meaningful manner." American Motors Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1244 (3d Cir. 1975). We have a serious concern in the present case that without any discovery appellants did not have this opportunity prior to dismissal. Our concern is especially heightened in a case like this one where the information sought by plaintiffs, if it exists at all, presumably rests in the exclusive possession of the defendants. See e.g., Eaton v. Dorchester Development, Inc., 692 F.2d 727, 731 (8th Cir. 1982); Williamson v. Tucker, 645 F.2d 404, 411 (5th Cir. 1981).

[2]Writing only for himself, Judge Cowen would additionally hold that, regardless of whether it followed the correct procedures, the District Court erred by dismissing the initial complaint. In his view, Solid Waste Agency v. U.S. Army Corps of Engineers, 101 F.3d 503 (7th Cir. 1996) is instructive on the standing question here. In Solid Waste, a concerned citizens group sought to intervene in a federal lawsuit in order to prevent a proposed landfill from being built on a 500-acre site adjacent to their town's border. It was alleged that the operation of the landfill would lower property values of land in the neighboring town; that its operation would produce noise, dust, and odors in the adjacent residential villages; and that its operation would deprive the citizens group of the environmental amenities that the site affords in its present undeveloped state. 101 F.3d at 504.

In Solid Waste, Chief Judge Posner looked specifically to the law of standing for guidance in order to determine whether the requirements for intervention under Rule 24(a)(2) of the Federal Rules of Civil Procedure were satisfied. Judge Posner concluded unequivocally that the citizens group had standing: "Notwithstanding their lack of a property right in the site, [the citizens group] would have a sufficient interest to give them standing to challenge the grant of the permit within the federal court . . . ." Id. (emphasis added). In the final analysis, Judge Posner reasoned that plaintiffs had standing (and had the right to intervene) to challenge the grant of a permit for the landfill by the defendants insofar as plaintiffs had complained that the landfill would have nuisance-like consequences. Id.

Appendix D

Another reason that we will remand the case to the District Court for discovery on the standing issue is that plaintiffs clearly have standing under Article III based upon the allegations raised in the proposed amended complaint and the motion for reconsideration. In the amended complaint, plaintiffs alleged that defendants had a financial interest in the ownership and operation of the landfill as a result of an elaborate $1.5 million kickback scheme fraudulently disguised as a land-purchase. App. 744a. Plaintiffs specifically alleged that defendants "funnel nearly all the fees generated from the landfill, and nearly the entire operating budget of the Borough, to Morgantown

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In Judge Cowen's view, this case is very similar to Solid Waste. He notes two reasons why that is so. First, like the plaintiffs in Solid Waste, the plaintiffs here seek to attack the issuance of a permit for the landfill by the defendants. Second, like the plaintiffs in Solid Waste, the plaintiffs here also have complained that the landfill has had almost exactly the same nuisance-like consequences (i.e. reduction in property values caused by activities on neighboring land and an assault on the senses by noise, dust, and odors).

Judge Cowen also underscores that the point is not (as the defendants seem to suggest) that there is no standing because there would have been no injury to plaintiffs had DEP not issued its permit or had BFI not operated the landfill in the way that it did. Rather, in his view, the point is that none of the subsequent actions which were in fact taken by DEP or BFI are sufficient to obliterate altogether standing against the defendants (at least at the motion to dismiss stage) for the role that they allegedly played in authorizing the injurious conduct here in the first instance. See App. 19a (alleging that "[d]efendants have . . . authorized . . . a massive accumulation of unreasonably noxious, abusive, destructive, and objectionable uses, imposing a wide range of adverse effects on their surrounding neighbors, for [defendants'] benefits") (emphasis added).

Properties and Carr. This same or similar procedure is or will be used to funnel money from the operation of the race track, detention center and industrial tile/ceramics factory." Id.

The District Court denied the plaintiffs' motion for leave to amend the complaint on futility grounds. The defendants have not attempted to defend the District Court's decision that it would have been futile to grant plaintiffs leave to amend on the standing issue. The allegation that defendants had a financial interest in the landfill, if it is proven to be true, would confer standing on plaintiffs who are seeking to recover damages for their alleged injuries from the landfill.[3] Because it would not have been futile to grant

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[3]During the following exchange at oral argument, counsel for defendants acknowledged that it would not have been futile to grant plaintiffs leave to amend the complaint in order to raise the allegation involving the $1.5 million kickback scheme for the landfill:

The Court: Taken from the light most favorable to your adversary, suppose he can prove that there is the million-and-a-half dollars being milked off for Mr. Carr . . . and that Carr is using the town for his own aggrandizement. Is it your position that there is no standing for the plaintiffs in that condition if they are in effect being damaged by the way the town is being run?

Defendants' counsel: No, but that's not this case.

The Court: On the motion for reconsideration, that is this case, sir.

Defendants' counsel: Well, maybe so.

plaintiffs leave to amend the complaint, the District Court was in error.[4]

III.

In support of their position that certain claims brought by plaintiffs are unripe, defendants rely upon this Court's decision in Taylor Investment Ltd., v. Upper Darby Township, 983 F.2d 1285 (3d Cir. 1993).[5] But Taylor is of no avail to the defendants here. Despite defendants' protestations to the contrary, Taylor nowhere requires a plaintiff to go further than the applicable township zoning procedures like the plaintiffs did in this case in order to make a claim ripe for adjudication in the federal courts.[6]

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[4]We will also reverse and remand the District Court's dismissal of the plaintiffs' Hobbs Act claim, 18 U.S.C. § 1962, because the District Court incorrectly conducted its Rule 12(b)(6) analysis. The District Court based its dismissal decision on independent factual findings reached during its 12(b)(1) analysis. Such fact-finding is inappropriate in deciding a Rule 12(b)(6) motion, where a court must "presume that general allegations embrace those specific facts that are necessary to support the claim" and it "must [] sustain [a complaint] if relief could be granted under any set of fact that could be proved consistent with the allegations." NOW v. Scheidler, 510 U.S. 249, 256 (1994) (internal quotations omitted). Of course, we express no view at all on whether plaintiffs have properly alleged a cause of action under RICO or whether such a claim would survive a renewed motion to dismiss or a motion for summary judgment.

[5]Since the landfill has been in operation for approximately four years and the prison facility now has been finally approved, these claims quite obviously are ripe for adjudication.

[6]The ripeness requirement arising in zoning dispute cases does not apply to plaintiffs' claims for another reason. Plaintiffs are not appealing from an adverse decision on a zoning permit application. Rather, plaintiffs are asserting that the defendants deliberately and improperly interfered with the process by which permits were issued for the landfill. Such actions, if properly alleged and proven to be true, are sufficient to establish violations under § 1983 and RICO even if plaintiffs were ultimately

For the above reasons, we reverse and remand for further proceedings consistent with this opinion. Costs taxed against appellees.

TO THE CLERK:

Please file the foregoing opinion.

Robert E. Cowen
United States Circuit Judge

---

successful in having the permits for the landfill revoked by state authorities. Because plaintiffs' federal constitutional claims are not dependent on a final decision from any state administrative agency, their claims are now ripe. See e.g., Blanche Road Corp. v. Bensalem Twp., 57 F.3d 253, 267-68 (3d Cir. 1995) (plaintiff's § 1983 claim alleging that actions of township officials in connection with permits for industrial park violated its substantive due process rights was ripe since it was not dependent on a final decision from any administrative agency).

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1219

TRI-COUNTY CONCERNED CITIZENS ASSOCIATION;
PATTY BRANN; KATHY BRILL; WILLIAM CRANSTON;
HOLLY HARTSHORNE; BARBARA MESSNER,

Appellants

v.

RAYMOND CARR; MORGANTOWN PROPERTIES, INC.;
WILLIAM BETZ; JUDITH BETZ; ROBERT G. WILLIAMS;
CAROLYN WILLIAMS; CHERYL CONKEL; NEW MORGAN BOROUGH

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. No. 98-cv-04184)
District Judge: Honorable Ronald L. Buckwalter

Present: SCIRICA, COWEN and MAGILL*, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on October 20, 1999.

*Honorable Frank J. Magill, U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

Appendix D

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered on February 24, 1999, be, and the same is hereby reversed and remanded for further proceedings consistent with the opinion of the Court. Costs taxed against appellees. All of the above in accordance with the opinion of this Court.

ATTEST:

P. Douglas Sibley

Clerk

Dated: DEC - 7 1999

Appendix E

Tri-County Concerned Citizens Association
v.
Carr

2000 WL 1521615
E.D.Pa.,2000

MEMORANDUM AND ORDER

BUCKWALTER, J.

In a December 7, 1999, memorandum opinion, the Third Circuit instructed this Court to grant Plaintiffs leave to file an amended complaint ("the December 7, 1998 amended complaint"). Leave was granted, but rather than filing and serving the December 7, 1998 amended complaint, Plaintiffs filed a different amended complaint on March 13, 2000 ("the March 13, 2000 amended complaint"). In their Joint Motion to Dismiss, Defendants pointed out this discrepancy and explained that their instant motion was based on the March 13, 2000 amended complaint. Plaintiffs then filed their Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss. In that memorandum, Plaintiffs called the discrepancy an "error" and blamed it on a computer glitch. Plaintiffs also expressed intention to file a motion for leave to file the proper complaint but never did.

It is ORDERED that Plaintiffs file a motion for leave to file the December 7, 1998 amended complaint within ten days of this Memorandum and Order. Failure to do so will result in the Court moving forward with this case based on the March 13, 2000 amended complaint.

The question of whether sanctions should be imposed as requested by Defendants will be decided by the Court when and if a proper motion is filed.
E.D.Pa.,2000.

Appendix F

Tri-County Concerned Citizens Association
v.
Carr

2000 WL 1824172
E.D.Pa.,2000

MEMORANDUM

BUCKWALTER.

Presently before the Court is Plaintiffs' Motion for Leave to Amend Complaint and Defendants' Response thereto, et cetera. The proposed complaint is the fourth complaint and the third amended complaint offered by Plaintiffs in this case. Defendants argue the instant motion should be denied because either Plaintiffs' Counsel's lapses of professionalism, intentional gamesmanship or both have raised issues of, inter alia, undue delay, bad faith, and prejudice. The Court agrees. In the Order accompanying this Memorandum, the Court will deny the instant motion and grant Plaintiffs leave to file Plaintiffs' December 7, 1998 amended complaint (the "Amended Complaint").

I. BACKGROUND

Plaintiffs filed this suit on August 10, 1998. The Court then granted Defendants' first motion to dismiss and soon thereafter denied Plaintiffs' Motion to Amend Complaint and for

Reconsideration. Nearly one year later the Third Circuit reversed and remanded this case because it believed Plaintiffs asserted facts which warranted remand in the proposed Amended Complaint. Consistent with the Third Circuit's opinion, the Court granted Plaintiffs leave to file their Amended Complaint. Plaintiffs, however, filed a different amended complaint on March 13, 2000 (the "Second Amended Complaint"). Remarkably, the Second Amended Complaint failed to make the allegations which the Third Circuit relied upon in making its decision to remand.

Despite Plaintiffs' failure to follow the Court's order, Defendants filed a Joint Motion to Dismiss this Second Amended Complaint. In that motion, Defendants remonstrated the discrepancies between the two versions and the shortcomings of the Second Amended Complaint. Plaintiffs then filed their Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss in which they made four pertinent claims: 1) they "intended to file the [Amended Complaint] and simply filed a different version by mistake;" 2) they "would seek leave of Court to correct this error and to file the [Amended Complaint] consistent with the Court's previous decision;" 3) the "accidental" filing was caused by a "failure to properly store the changes in the computer file;" and 4) their memorandum referred to the "[Amended Complaint], since that complaint is the one the Court authorized Plaintiffs to file" even

though Defendants' Motion to Dismiss was based on the Second Amended Complaint. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss at 2-3. On October 4, 2000, the Court ordered Plaintiffs to file a motion for leave to file the Amended Complaint in an effort to square the pleadings with the Third Circuit's decision to remand and to square all motions and memorandums with each other. The Court also believed the Order was a generous opportunity for Plaintiffs to correct their errors without penalty and file the Amended Complaint as they maintained they intended. The Order explained to Plaintiffs their failure to comply would result in the Court proceeding with the case based on the Second Amended Complaint, essentially giving Plaintiffs a choice between the two amended complaints. Rather than choosing either of these two courses, Plaintiffs ignored the Order by filing a motion for leave to file a different amended complaint (the "Third Amended Complaint"). It is this motion the Court will deny but the Court will grant Plaintiffs leave to file the Amended Complaint within ten days.

II. DISCUSSION

Leave to amend "shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). Leave can be denied, however, in the presence of "undue delay, bad faith or dilatory motive on the part of the movant, ... undue prejudice to the opposing party ..., [or] futility of

amendment...." Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); e.g., Alvin v. Suzuki, 227 F.3d 107, 121 (3d Cir.2000). The Court believes Plaintiffs' actions give rise to three of these alternative grounds for denying a motion for leave: undue delay, bad faith, and prejudice.

A. Undue Delay

The Court believes Plaintiffs' mishaps and delays have placed an unwarranted burden on the Court and therefore have caused undue delay. See Adams v. Gould, Inc., 739 F.2d 858, 868 (3d Cir.1984) (explaining that delay becomes undue when it places an unwarranted burden on the court). In Oran v. Stafford, 226 F.3d 275 (3d Cir.2000), the Third Circuit upheld a district court finding of undue delay when (1) plaintiffs had already amended their complaint once, (2) the case was one and one half years old, (3) no discovery had been taken, and (4) plaintiffs had four months to file the proposed amended complaint. Oran, 226 F.3d at 291 (citing Oran v. Stafford, 34 F.Supp.2d 906, 914 (D.N.J.1999)). Similarly, in Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644 (3d Cir.1998), the Third Circuit affirmed a district court's denial of a motion for leave to amend for undue delay when (1) plaintiffs were permitted to file an amended complaint, (2) the district court accepted additional allegations made in a response to a motion to dismiss as a second amended complaint, and (3) plaintiffs had ample opportunity to plead their

allegations properly and completely. [FN1]

FN1. . In Rolo, the Third Circuit alluded to its decision in Gasoline Sales, Inc. v. Aero Oil Company, 39 F.3d 70 (3d Cir.1994), which has language the Court believes is worth repeating as it is pertinent to this case. Rolo, 155 F.3d at 654. In Gasoline Sales, the Third Circuit affirmed a district court's refusal to grant leave to amend and reasoned:

... as the district court stated, "three attempts at a proper pleading is enough" and a "plaintiff has to carefully consider the allegations to be placed in a complaint before it is filed." [Plaintiff] is not seeking to add claims it inadvertently omitted from its prior complaints or which it did not know about earlier. Rather [plaintiff] is modifying the allegations in hopes of remedying factual deficiencies in its prior pleadings.... Gasoline Sales, 39 F.3d at 74.

Several of the factors considered in these Third Circuit cases are present in the instant case. First, Plaintiffs have amended their complaint twice before this latest attempt, and by virtue of the October 4, 2000 Order, had a choice between moving forward with the Amended Complaint or the Second Amended Complaint. Second, the case is more than two years old. Third, Plaintiffs have had since March 14, 2000 to file the Amended Complaint and never did. That leave was granted nearly seven months

prior to the October 4, 2000 Order, and despite Plaintiffs' disingenuous claims of not having possession of the Amended Complaint, the Amended Complaint has been available to Plaintiffs, if in no other form, as an exhibit to Defendants' April 7, 2000 Joint Motion to Dismiss. Fourth, Plaintiffs indicated to the Court in their May 2, 2000 Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss they mistakenly filed the Second Amended Complaint and would motion for leave to file the Amended Complaint. Again, they never did. Finally, the instant motion, which Plaintiffs filed in disregard of the October 4, 2000 Order, has prolonged, and, if accepted, would continue to prolong this litigation causing the Court to expend time and resources unnecessarily. The Court believes these facts are sufficient for a finding of undue delay.

B. Bad Faith

The Court believes Plaintiffs' Counsel's conduct is a clear example of bad faith. The Court reaches this conclusion when considering inter alia Counsel's delay in filing the instant motion for leave to amend, Counsel's failure to follow Court orders, and Counsel's disingenuous excuses for not following these orders. First, Counsel has delayed this litigation for several months by not filing a motion for leave to amend until after the Court issued its October 4, 2000 Order. The Court believes Plaintiffs could have filed the instant motion many months before the October

4, 2000 Order and failed to intentionally or, at the very least, unprofessionally. The primary difference between Plaintiffs' Third Amended Complaint and their Second Amended Complaint can be found in facts alleged in the Amended Complaint indicating the new information was available to Plaintiffs long before they petitioned for leave. See Friedman v. Transamerica Corp., 5 F.R.D. 115, (D.C.Del.1946) (denying a motion for leave to amend when plaintiffs made a third request to amend and the new matter had been alleged in the first amended complaint but was not included in plaintiffs' second amended complaint); see also 6 Wright, Miller & Kane, Federal Practice and Procedure § 1487 (2d ed.1990) (explaining that delay alone may not result in denial of leave but that leave may be denied if the moving party had the information used in making the amendments at the time of earlier pleadings and there is no excuse for having failed to plead them). The Court also is concerned Plaintiffs intentionally filed the deficient Second Amended Complaint knowing Defendants would motion to dismiss it and knowing they intended to incorporate strategy developed from reviewing that motion to dismiss in the Third Amended Complaint. Whether Plaintiffs were acting strategically with a dilatory motive or simply lacked professionalism and respect for the Court and the parties, this delay appears to be the result of bad faith.

Appendix F

The second indication of Plaintiffs' Counsel's bad faith is his failure to follow Court orders. In a March 10, 2000 conference, the Court indicated it intended to grant Plaintiffs leave to file the Amended Complaint which inspired the Third Circuit's decision to remand. See March 14, 2000 Court Order ("Upon the agreement of the parties entered at conference ... Plaintiffs are granted leave to file and serve their amended complaint ..."). Counsel, by his own admission, understood this grant of leave to be directed toward the Amended Complaint and not just any amended version of the complaint. See Plaintiff's Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss at 3. Nonetheless, Counsel filed the Second Amended Complaint instead of the Amended Complaint disregarding the Order and the terms agreed upon in conference.

Eight months later Counsel ignored another Court order. In the Court's October 4, 2000 Order, the Court, in no uncertain terms, ordered Plaintiffs to file a motion for leave to file the Amended Complaint. Instead, Counsel ignored the Order and motioned for leave to file another version, the Third Amended Complaint. The Court believes Counsel's refusal to follow orders of the Court is an affront to the authority of the Court and a lack of professional responsibility which risks the rights of his clients. See Sweeney v. Saint Joseph's Hospital, 769 F.Supp. 747

(M.D.Pa.1991) (relying on a plaintiff's failure to follow court orders as evidence of bad faith and a ground for dismissing the case).
The third indication of Plaintiffs' Counsel's bad faith is the disingenuous nature of the excuses offered to answer for his failure to follow orders. After failing to follow the first order, Counsel asserted the improper filing was an unintentional mistake caused by a failure to properly store changes in the computer file. See Plaintiff's Memorandum of Law in Opposition to Defendants' Joint Motion to Dismiss at 2. Then, after not following the October 4, 2000 Order, Counsel again blamed computer problems claiming he had "inadvertently lost [the Amended Complaint] in the computer retrieval." See Plaintiffs' November 13, 2000 Reply Brief at 4. The Court finds no credibility in these excuses knowing a copy of the Amended Complaint was available in Defendants' second motion to dismiss, if not previous filings with the Court. Counsel's excuses are akin to the proverbial "the dog ate my homework" excuse.

Based on the foregoing, the inescapable conclusion is that Plaintiffs' Counsel exercised bad faith.

C. Prejudice

The Court believes Plaintiff's Counsel's conduct has prejudiced Defendants and a granting of the instant motion would prejudice Defendants even further. The Third Circuit

requires a party trying to show prejudice in a Rule 15 context to demonstrate that its ability to present its case would be seriously impaired were amendment allowed. Dole v. Arco Chemical Co., 921 F.2d 484, 488 (3d Cir.1990) (citing Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir.1989)). Although the Court does not believe Defendants have established prejudice that meets this standard specifically, it does believe a denial of Plaintiffs' motion is warranted when considering prejudice in light of the totality of the circumstances.
The following considerations illuminate this point. First, this latest amended complaint, if allowed, could potentially force Defendants to answer new factual allegations over two years after the inception of the case. Second, since the Third Circuit remanded the case one year ago, Plaintiffs have subjected Defendants to prolonged litigation, two unnecessary rounds of motions, and considerable financial expense. Third, the Court is unwilling to allow Plaintiffs to capitalize on their own failures by filing this most recent amended complaint which takes into account Defendants' second motion to dismiss, to which Plaintiffs failed to respond. See Sweeney v. St. Joseph's Hospital, 769 F.Supp. 747, 749 (M.D.Pa.1991) (finding prejudice in the context of a dismissal for failure to comply with court orders when defendants would have to answer new allegations one-and-one half years after an original complaint was filed, defendants would be subjected to a fourth round of motions, and

plaintiff's would have another opportunity to oppose previously unopposed motions to dismiss.) Finally, although they provide no concrete evidence, Defendants raise a reasonable concern that the prolonging of this case has maintained a cloud of uncertainty over the operations of the Borough, the rights of property owners within the Borough, and the rights of third parties who, although not before the Court, have investments tied to the Borough. The Court believes Defendants have been prejudiced, and will be prejudiced further if Plaintiffs are permitted to amend their complaint once again.

III. CONCLUSION

For all of the reasons set forth above, Plaintiffs' October 16, 2000 Motion for Leave to Amend Complaint will be DENIED.

An appropriate order follows.

ORDER

AND NOW, this 11th day of December, 2000, upon consideration of Plaintiffs' Motion for Leave to Amend Complaint (Docket No. 46) and Defendants' Joint Response thereto (Docket No. 47) et cetera, it is ORDERED as follows:

A. Plaintiffs' Motion for Leave to Amend Complaint is DENIED.

B. Plaintiffs are GRANTED ten (10) days to file their December 7, 1998 amended complaint.

Appendix G

Tri-County Concerned Citizens Association
v.
Carr

2001 WL 87739
E.D.Pa.,2001

MEMORANDUM

BUCKWALTER.

Plaintiffs have filed two motions as a result of this Court's Memorandum dated December 11, 1000 (hereafter "Memorandum"). First is a Motion for Reconsideration, Stay and Recusal, and the second is a Motion for an Evidentiary Hearing on the Motion for Reconsideration, Stay and Recusal.

Both motions are based on the faulty premise that this Court made findings of fact as to counsel's actions and motives. This is simply not correct. The Court's Memorandum was issued in the context of explaining its Rule 15 analysis, and the individual factors which militate against granting leave to amend. It contains no "findings of fact". To the extent the memorandum sets forth facts of record, that record, being docket entries and their content, speaks for itself. To the extent the Court drew inferences from those facts, those inferences are fair and appropriate in the context of a Rule 15 analysis. The order following the

Memorandum makes that crystal clear. It simply denies the motion to amend and grants plaintiffs leave to file its December 7, 1998 amended complaint.

Counsel for plaintiffs and pro se's motion for recusal is surprising. Frankly, my only recollection of him is a March 10, 2000 conference at which I found counsel for plaintiffs and pro se to be cordial professionally and personally.

Counsel submit the following paragraph relative to recusal:
In view of (a) the Court having already determined the facts, (b) and the content and tone of its Memorandum of December 11, together with the Court's prior actions (c) denying plaintiffs leave to amend in January 1999; and (d) denying plaintiffs an opportunity to respond to defendants' extra specially allowed brief in November 2000, thereto pursuant to constitutional protections and established law as set forth in the attached Memorandum, the Court must recuse itself.

This is simply not the type of judicial conduct that supports recusal, even if it were totally accurate, which it is not. This Court has made no findings of fact. It should also be noted relative to the so-called "defendants' extra specially allowed brief in November 2000" that said brief was no more than a surreply to plaintiffs' reply (Docket No. 48).

Appendix G

The paragraph in support of the motion for stay states as follows:

A stay is required because based on the discussion in the Court's memorandum of December 11, 2000, it appears that the Court intends to dismiss if the Amended Complaint is filed, therein causing serious prejudice to plaintiffs (Memo, pg.5) (amendment would "prolong this litigation").

This, of course, is totally without foundation. The Court, because of the history of this case, has never even had a chance to consider the merits of Defendants' Motion to Dismiss the Amended Complaint, or Plaintiffs' response thereto.
An order follows.

ORDER

AND NOW, this 30th day of January, 2001, upon consideration of Plaintiffs' Motion for Reconsideration, Stay and Recusal, and Defendants' Joint Response in Opposition thereto, it is hereby ORDERED as follows:

1. Plaintiffs' Motion for Reconsideration, Stay and Recusal (Docket No. 51) and Plaintiffs' Motion for an Evidentiary Hearing on that motion (Docket No. 52) are DENIED in all respects.

2. Plaintiffs are granted ten (10) days from

the date of this Order to file and serve their December 7, 1998 Amended Complaint.

3. Any failure by Plaintiffs' counsel to file and serve the December 7, 1998 Amended Complaint as required herein may result in the dismissal of Plaintiffs' claims, upon subsequent motion of the Defendants.
E.D.Pa.,2001.